

**COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
FILE NO. AOF-24184-037
PERMIT NO. 460-5087, INCREMENT NO. 1
NON-COMPLIANCE NO. 41-1229
CESSATION ORDER NO. 04-1272**

WIND RIVER ENERGY CORPORATION

PETITIONER

VS.

FINAL ORDER

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

RESPONDENT

* * * * *

THIS MATTER is before the Secretary on the Report and Recommendation of the Hearing Officer. Having considered the Hearing Officer's Report and Recommendation and any exceptions and responses thereto, and being otherwise sufficiently advised, it is hereby ORDERED AND ADJUDGED as follows:

1. The Hearing Officer's Report and Recommendation filed on ____[2/4/00]_____, _____, is incorporated by reference as if fully stated herein. The recommended Findings of Fact and Conclusions of Law set out in the Hearing Officer's Report are adopted by reference as the Findings of Fact and Conclusions of Law for this Final Order.

2. The motion for summary disposition filed by the Natural Resources and Environmental Protection Cabinet ("Cabinet") is GRANTED.

3. Wind River's Permit No. 460-5087 is REVOKED and Wind River is INELIGIBLE to receive another permit or begin another operation or to have suspended permits or operations reinstated until it has complied with the requirements of the Kentucky surface mining laws.

4. The determinations of bond forfeiture issued on May 12, 1999, are affirmed and the following performance bonds be forfeited to the Cabinet:

(a) The unreleased portion of Surety Bond No. VKY-92-0317, in the amount of \$5,600, posted by Van-American Insurance Company; and

(b) The unreleased portion of Surety Bond No. VKY-92-0273, in the amount of \$800, posted by Van-American Insurance Company.

5. Wind River shall abate all outstanding violations on Permit No. 460-5087.

6. This is a FINAL and appealable Order.

ENTERED this the _____ day of _____, _____.

[3/10/00] //S//

JAMES E. BICKFORD, SECRETARY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

APPEAL RIGHTS

In accordance with the provisions of KRS 350.0305 and KRS 350.032, any person or party aggrieved by a Final Order of the Secretary resulting from a hearing may obtain a review of the Final Order by filing in Circuit Court a Petition for Review. Such petition must be filed within thirty (30) days after the entry or rendition of the Final Order, and a copy of the Petition must be served upon the Cabinet.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing FINAL ORDER was, on this _____ day of _____, _____ mailed by first-class mail, postage prepaid, to:

WIND RIVER ENERGY CORPORATION
120 ARROWHEAD ROAD
LOUISVILLE KY 40207

WIND RIVER ENERGY CORPORATION
500 W JEFFERSON STREET
LOUISVILLE KY 40202

HON. MICHAEL DAVIDSON
120 ARROWHEAD ROAD
LOUISVILLE KY 40207

VAN-AMERICAN INSURANCE COMPANY
167 E MAIN STREET
SUITE 210
LEXINGTON KY 40507

And Hand-Delivered To:

Hon. Mark A. Posnansky
Office Of Legal Services
Natural Resources and
Environmental Protection Cabinet
Fifth Floor, Capital Plaza Tower
Frankfort, Ky 40601

DOCKET COORDINATOR

DISTRIBUTION:
DIVISION OF FIELD SERVICES/BFS
PRESTONSBURG REGIONAL OFFICE
LTS
HEARING OFFICER, JCT
ORDER FILE/JK
NCJ
RELATED FILE; PAC-24184-IV

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NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
FILE NO. AOF-24184-037
PERMIT NO. 460-5087, INCREMENT NO. 1
NON-COMPLIANCE NO. 41-1229
CESSATION ORDER NO. 04-1272**

WIND RIVER ENERGY CORPORATION

PETITIONER

VS. HEARING OFFICER'S REPORT AND RECOMMENDED ORDER

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

RESPONDENT

* * * * *

This matter is before the undersigned on a Motion for Summary Disposition filed by Respondent, Natural Resources and Environmental Protection Cabinet ("the Cabinet"). No response has been filed by Petitioner, Wind River Energy Corporation ("Wind River") within the time for filing a response.

Wind River is represented in this matter by Hon. Michael W. Davidson. The Cabinet is represented by Hon. Mark A. Posnansky. After fully reviewing the Cabinet's Motion for Summary Disposition as well as the existing record in regard to this matter, the undersigned recommends as follows: 1) the Cabinet's motion be granted; 2) the subject permit be revoked; 3) the determinations of bond forfeiture issued on May 12, 1999, be affirmed and the unreleased portions of Surety Bond Nos. VKY-92-0317 and VKY-92-0273 be forfeited to the Cabinet; and 4) Wind River be ordered to abate the outstanding violations.

I. FINDINGS OF FACT / PROCEDURAL HISTORY

The record for decision in this matter includes the pleadings, the affidavit and the exhibits filed with the Cabinet's Motion for Summary Disposition. Based upon the record before me, I find the following facts.

1. The Cabinet issued Surface Mining and Reclamation Operations Permit No. 460-5087 to Wind River on April 19, 1984. The permit was modified effective September 5, 1995.

2. This permit is incrementally bonded and secured by two separate performance bonds. A Phase 1 bond release was granted on April 1, 1996, as to one of the bonds. Increment No. 1 is presently secured by the following:

(a) Surety Bond No. VKY-92-0317 issued by Van-American Insurance Company on December 4, 1992, in the original amount of \$12,400. The present unreleased amount of this bond is \$5,600; and

(b) Surety Bond No. VKY-92-0273 issued by Van-American Insurance Company on July 31, 1992, in the original and presently unreleased amount of \$800.

3. On May 19, 1998, the Cabinet issued Notice of Non-Compliance No. 41-1229 to Wind River citing the following violations:

- (a) 405 KAR 7:040 (off permit disturbance);
- (b) 405 KAR 18:100 (failure to submit annual re-certification documents for sediment ponds); and
- (c) 405 KAR 18:110 (failure to submit water monitoring reports).

4. All of the violations cited in the Notice of Non-Compliance were deemed to be correctable.

5. On June 4, 1998, the Cabinet issued a Modification to Notice of Non-Compliance No. 41-1229, citing 401 KAR 5:065 as an additional regulation regarding the failure to monitor water quality.

6. Cessation Order No. 04-1272 was issued to Wind River on July 9, 1998, due to Wind River's failure to abate the violations contained in Notice of Non-Compliance No. 41-1229.

7. On January 26, 1999, the Secretary of the Cabinet entered a final Order in File No. PAC-24184-IV styled Natural Resources and Environmental Protection Cabinet v. Wind River Energy Corporation. In said Order, the violations set forth in Notice of Non-Compliance No. 41-1229 and Cessation Order No. 04-1272 were deemed admitted. The Order was not appealed.

8. On May 12, 1999, the Cabinet issued Administrative Determinations of Bond Forfeiture regarding Surety Bond Nos. VKY-92-0153, VKY-92-0317 and VKY-92-0273¹. The determination concerned Increment 1 of the permit and is the subject of the present action before this Hearing Officer.

9. On October 25, 1999, the Cabinet vacated the violation of 405 KAR 7:040 (off permit disturbance) by issuance of a Modification to Notice of Non-Compliance No. 41-1229.

¹ Following the filing of a motion for summary disposition, the Cabinet was notified by the bonding company, Van-American, that one of the bonds in question, Surety Bond No. VKY-92-0153 has been eligible for release since the issuance of a minor revision on January 12, 1993, and should therefore not be listed among those bonds to be forfeited in this case. Thus, the Hearing Officer does not recommend forfeiture of Surety Bond No. VKY-92-0153.

10. Danny Clark, the inspector assigned to the permit, has tendered an affidavit stating that the violation of 405 KAR 18:100, and the violation of 405 KAR 18:110 and 401 KAR 5:065 remain in effect and are unabated. Those violations, moreover, are correctable.

II. CONCLUSIONS OF LAW/RECOMMENDATIONS

Based upon the arguments of the parties and the applicable legal criteria, the undersigned makes the following Conclusions of Law and Recommendations:

11. The procedural regulations of this agency state that summary disposition is appropriate if the record discloses that there is no disputed issues as to any material fact and the moving party is entitled to summary disposition as a matter of law. 405 KAR 7:091, Section 3(4). Facts alleged in the motion must be verified by affidavit or verified by presentation in binding admissions, in sworn deposition responses, or in sworn answers to interrogatories. 405 KAR 7:091, Section 3(4)(a).

12. Kentucky courts have repeatedly emphasized that once a party has made factual allegations supported by sworn affidavits entitling it to judgment as a matter of law, the opponent must tender opposing affidavits, or point to other sworn or binding proof contained in the record, in order to defeat a motion for summary judgment and establish that he has some means to prove that the movant's allegations are false. Continental Cas. Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914 (Ky. 1955).

13. The record discloses no material disputed facts. The fact of the alleged violations has been established by the Cabinet in two ways. First, the factual allegations in the Cabinet's motion are supported by the affidavit of Inspector Danny Clark which states that the violations of 405 KAR 18:100 and of 405 KAR 18:110 and 401 KAR

5:065 remain in effect, are unabated and are correctable. Moreover, the violations affect Increment 1, the subject of this action. Secondly, the Cabinet established that the Secretary has previously affirmed the fact of the violations by final Order of the agency, which is final and not on appeal. The doctrines of collateral estoppel and res judicata preclude relitigation of the fact of the violation. Therefore, the Cabinet has clearly established that there is no factual dispute concerning whether there exist unabated violations on Increment 1 of the permit. The only issue that must be addressed is whether the Cabinet is entitled to bond forfeiture.

14. The legal standard the Cabinet must meet to establish entitlement to the relief requested is KRS 350.130(1), governing violations and bond forfeiture. That statute directs the Cabinet to issue a notice of noncompliance whenever a permittee fails to comply with any of the requirements of KRS Chapter 350 or the administrative regulations adopted pursuant to that statute. In the event that a noncompliance is not abated in a timely manner, the Cabinet is directed to issue a cessation order. KRS 350.130 (1) further states that if the permittee:

...has not reached an agreement with the cabinet or has not complied with the requirements set forth in the notice of noncompliance and cessation order within the time limits set therein, the permit may be revoked or the operation terminated, after an opportunity for a hearing, by order of the cabinet and the performance bond, if any, shall be forfeited to the cabinet...

15. The regulations provide, in pertinent part, that a bond shall be forfeited if the permittee has violated any of the terms of conditions of the bond and has failed to take corrective action, or has failed to conduct the surface mining and reclamation

operations in accordance with KRS Chapter 350, the conditions of the permit or 405 KAR Chapters 7 through 24 within the time required. 405 KAR 10:050, Section 3(1).

16. Since the Cabinet has established that correctable violations exist on Increment 1 which have not been abated and remain unabated, the Cabinet has made a showing that it is entitled to permit revocation and bond forfeiture.

17. Since Wind River has not sought to respond to the motion for summary disposition, the Cabinet's allegations stand admitted and granting of the Cabinet's motion is appropriate.

18. Based upon the foregoing, I recommend that the Secretary enter a final Order determining:

(a) That the Cabinet's motion for summary disposition be granted;

(b) That Permit No. 460-5087 be revoked and that Wind River be determined ineligible to receive another permit or begin another operation or to have suspended permits or operations reinstated until it has complied with the requirements of the Kentucky surface mining laws;

(c) That the determinations of bond forfeiture issued on May 12, 1999, be affirmed and the unreleased portions of Surety Bond Nos. VKY-92-0317, in the amount of \$5,600, and VKY-92-0273, in the amount of \$800, be forfeited to the Cabinet; and

(d) That Wind River be ordered to abate all outstanding violations on Permit No. 460-5087.

SO RECOMMENDED this _____ day of _____, _____.

_____[2/4/00] //S//_____
JANET C. THOMPSON
HEARING OFFICER
OFFICE OF ADMINISTRATIVE HEARINGS
35-36 FOUNTAIN PLACE
FRANKFORT, KENTUCKY 40601
TELEPHONE: (502) 566-7312

EXCEPTIONS AND REPLY RIGHTS

Pursuant to KRS 350.0301, any party may file Exceptions to this Report and Recommendation within fourteen (14) days of service of this Report. A party may file a Response to any Exceptions within twenty-one (21) days of service of this Report. The Secretary will then consider this Report, Exceptions, Reply, and Recommended Order and decide the case.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing HEARING OFFICER'S REPORT AND RECOMMENDED ORDER was, on this _____ day of _____, _____, mailed by first-class mail, postage prepaid to:

WIND RIVER ENERGY CORPORATION
120 ARROWHEAD ROAD
LOUISVILLE KY 40207

WIND RIVER ENERGY CORPORATION
500 W JEFFERSON STREET
LOUISVILLE KY 40202

HON. MICHAEL DAVIDSON
120 ARROWHEAD ROAD
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VAN-AMERICAN INSURANCE COMPANY
167 E MAIN STREET
SUITE 210
LEXINGTON KY 40507

And Hand-Delivered To:

Hon. Mark A. Posnansky
Office Of Legal Services
Natural Resources And Environmental
Protection Cabinet
Fifth Floor, Capital Plaza Tower
Frankfort, Ky 40601

DOCKET COORDINATOR

DISTRIBUTION:
DIVISION OF FIELD SERVICES
PRESTONSBURG REGIONAL OFFICE
LTS
JCT
RELATED FILE: PAC-24184-IV

